TAY KIANG HEONG v. PP & ANOTHER APPEAL

COURT OF APPEAL, PUTRAJAYA
AB KARIM AB JALIL JCA
VAZEER ALAM MYDIN MEERA JCA
CHE MOHD RUZIMA GHAZALI JCA
[CRIMINAL APPEAL NO: D-09H-504-10-2018
& D-09H-505-10-2018]
30 APRIL 2024

Abstract – *The failure of the Court Recording and Transcribing system to record the entire trial proceeding does not render the trial a nullity that requires a retrial when there are sufficient manual notes of proceedings that are in conformity with the requirements of the Criminal Procedure Code.*

CRIMINAL PROCEDURE: *Charge – Date – Accused charged for outraging modesty of complainant – Allegation that accused wrongly convicted on charge which stated different date of offence whilst evidence led by prosecution showed that offence was committed on different date – Whether accused prejudiced – Penal Code, s. 354*

CRIMINAL PROCEDURE: *Trial – Recording – Court Recording and Transcribing system ('CRT') – Accused charged for outraging modesty of complainant – Accused requested to be provided with CRT recording of proceedings – Incomplete CRT recording due to technical problems – Whether there was miscarriage of justice – Whether rendered entire trial proceeding nullity warranting retrial – Penal Code, s. 354 – Criminal Procedure Code, ss. 266 & 267*

CRIMINAL PROCEDURE: *Appeal – Appeal by prosecution – Appeal against sentence – Accused convicted for offence of outraging modesty of complainant – Sessions Court sentenced accused to three years' imprisonment – High Court reduced sentence to three months' imprisonment together with fine of RM8,000, in default eight months' imprisonment – Whether sentence imposed by High Court manifestly low – Factors considered in imposing appropriate sentence – Penal Code, s. 354*

The accused was charged at the Sessions Court for outraging the modesty of the complainant, an offence under s. 354 of the Penal Code. The prosecution's narrative revealed that: (i) the accused had repeatedly visited the complainant's shop on different occasions; (ii) on 15 July 2015, the complainant's employee ('SP5') saw the accused coming towards the shop and had asked the complainant to hide in the storeroom. The complainant ran into the storeroom and was followed by the accused. The accused opened the storeroom door and the complainant tried to run; (iii) the accused then grabbed the complainant's hands and buttocks, hugged her from behind and caressed her breasts; (iv) the complainant, obviously scared, screamed but

was ignored by the accused. SP5, who had heard the complainant's screams, rushed into the kitchen and saw the accused holding the complainant's hand before letting it go. The accused then left the shop smiling; (v) the complainant lodged a police report the following day but had mistakenly stated that the incident happened on 13 July 2015, when it actually happened on 15 July 2015. The complainant then went back to the police station and made a second police report to correct the mistake and to make a more detailed report of the incident; and (vi) the investigating officer ('SP6') found that although there was a CCTV recorder inside the shop, it was not in working order on the day of the incident. At the conclusion of the trial, the accused was convicted of the charge and sentenced to three years' imprisonment. The accused appealed to the High Court, against both conviction and sentence, while the prosecution cross-appealed against the sentence. In support of his appeal, the accused submitted that, *inter alia*, (i) the Sessions Court had wrongly convicted the accused on a charge which stated the date of the offence was 13 July 2015 whilst the evidence led by the prosecution was that the offence was committed on 15 July 2015; (ii) there was no CCTV recording at the shop where the incident took place; and (iii) the unavailability of the full Court Recording and Transcribing ('CRT'), which the accused had requested for, meant that the High Court would not be able to see the demeanour of the prosecution's witnesses as well as the alleged interference of the Sessions Court Judge ('SCJ') when the accused's counsel was cross-examining the prosecution's witnesses. The High Court affirmed the conviction and allowed the accused's appeal against the sentence; the sentence was reduced to three months' imprisonment together with a fine of RM8,000, in default eight months' imprisonment. Accordingly, the prosecution's cross-appeal was dismissed. Hence, the present appeals by the accused and the prosecution.

Held (dismissing appeal by accused; allowing appeal by prosecution)
Per Vazeer Alam Mydin Meera FCJ delivering the judgment of the court:

(1) The charge originally stated that the offence was committed on 13 July 2015 and this was subsequently amended to 15 July 2015. This was subsequently read and explained to the accused and he pleaded not guilty, following which the trial continued. The complainant explained why she had stated the wrong date in her first police report and the explanation was accepted by the SCJ. The HCJ also found the explanation to be plausible and reasonable. In any event, the accused was not prejudiced by this change in date. He did not deny being in the complainant's shop on 15 July 2015 and going into the kitchen side of the shop and into the store where the complainant was hiding. Therefore, there was no merit in the issue of the date in the charge. (para 47)

(2) The evidence of SP6 was that the CCTV recorder was not functioning and, as such, there was no CCTV recording available to be produced in court. In any any event, the production of the CCTV recording of the goings-on in the shop front, even if it was available, was not going to help the accused as the offence was said to have been committed in the store at the kitchen and not in front of any CCTV camera. (para 48)

(3) The issue of the incomplete CRT recording was considered in depth by the HCJ. The HCJ was satisfied that there was a genuine technical fault resulting in the system not capturing and storing the audio-video data of the proceedings during the prosecution stage. Nevertheless, the HCJ found the manual notes of proceedings recorded in long hand by the SCJ to be sufficient and in conformity with the requirements of the Criminal Procedure Code. There was no miscarriage of justice. The failure of the CRT system to record the entire trial proceeding did not render the trial a nullity in order for a retrial to be ordered. (para 49)

(4) The High Court was right in affirming the decision of the Sessions Court to find the accused guilty of the offence charged. However, the sentence imposed by the High Court was manifestly low. Considering the seriousness of the offence and the impact on the complainant, and taking into consideration the sentencing trend for an offence under s. 354 of the Penal Code, a sentence of three months' imprisonment was manifestly inadequate. Therefore, the sentence imposed by the High Court was set aside and substituted with imprisonment of one year. The fine of RM8,000, in default eight months' imprisonment, was affirmed. (para 51)

Case(s) referred to:

Antonio Dias Caldeira v. Frederick Augustus Gray [1934] CLJU 5; [1934] 1 LNS 5 ***(refd)***
PP v. Datuk Hj Harun Hj Idris & Ors [1977] CLJU 92; [1977] 1 LNS 92 HC ***(refd)***
PP v. Munusamy [1980] CLJU 63; [1980] 1 LNS 63 FC ***(refd)***
Puganeswaran Ganesan & Ors v. PP & Other Appeals [2020] 9 CLJ 326 FC ***(refd)***
Samar Mansor v Mustafa Kamarul Arifin [1974] CLJU 147; [1974] 1 LNS 147 FC ***(refd)***

Legislation referred to:

Criminal Procedure Code, ss. 266, 267
Evidence Act 1950, ss. 8, 114(g)
Penal Code, ss. 349, 350, 351, 354

For the appellant - Lua Kok Hiong, Cheah Poh Loon & Ummi Salhah Mohamad; M/s Lua & Mansor
For the respondent - Dhiya Syazwani Izyan Mohd Akhir; DPP AG's Chambers

[Editor's note: Appeal from High Court, Kuala Lumpur; Criminal Appeal No: 42S-16-3-2017 (overruled in part).]

Reported by Najib Tamby

A

JUDGMENT

Vazeer Alam Mydin Meera JCA:

Introduction

B **[1]** There are two appeals before us emanating from a single judgment of the High Court in Kota Bharu, Kelantan. The first, Appeal No: D-09(H)-504-10-2018, is by Tay Kiang Heong ("Tay") against his conviction and sentence and the second, Appeal No: D-09(H)-505-10-2018, is by the Public Prosecutor against sentence.

C **[2]** Tay was charged in the Kota Bharu Sessions Court with an offence of outraging the modesty of one Ms Yeap Woan Tyng ("Ms Yeap") and the charge read as follows:

> Bahawa kamu pada 15/07/2015, jam lebih kurang 9.30 malam di sebuah kedai beralamat Kedai Kek Cintaku, Cawangan Pasaraya KB Mall, Jalan Hamzah, dalam daerah Kota Bharu dalam negeri Kelantan telah
D menggunakan kekerasan kepada Yeap Woan Tyng, No. K/P: 830306-035752, dengan niat untuk mencabul kehormatannya. Oleh yang demikian kamu telah melakukan satu kesalahan yang boleh dihukum dibawah Seksyen 354 Kanun Keseksaan.

E **[3]** Tay was convicted of the charge by the trial court and sentenced to three years imprisonment from the date of sentencing on 22 February 2017. Tay appealed to the High Court against both conviction and sentence, whilst the Public Prosecutor cross-appealed against sentence.

F **[4]** The High Court affirmed the conviction and allowed Tay's appeal against sentence. The sentence was reduced to three months imprisonment together with a fine of RM8,000 in default eight months imprisonment. Accordingly, the Public Prosecutor's cross-appeal was dismissed. This is the decision that is on appeal before us.

G **[5]** Tay paid the fine and the sentence of imprisonment was stayed pending appeal to this court. Tay was on bail when he appeared before us.

Our Decision

H **[6]** Having considered the appeal record and having heard and read the submissions of learned counsel for Tay as well as the learned Deputy Public Prosecutor, we had delivered our decision and brief grounds in respect of both appeals as follows:

(i) in respect of Tay's appeal in Appeal No: D-09(H)-504-10-2018, we dismissed the appeal in whole and affirmed the conviction; and

I (ii) in respect of the Public Prosecutor's cross-appeal in Appeal No: D-09(H)-505-10-2018, we allowed the appeal in part by enhancing the sentence of imprisonment from three months to one year and affirming the sentence of RM8,000 fine in default eight months imprisonment.

These are the full grounds for our decision.

At The Sessions Court

Prosecution's Case

[7] The prosecution adduced the following evidence as part of its case:

(i) on 9 July 2015, the complainant, Ms Yeap, saw a Chinese man looking into her shop Kedai Kek Cintaku, KB Mall, Kota Bharu from outside the door and going back and forth in front of the store three to four times;

(ii) on 10 July 2015, the same Chinese man, later identified as Tay, entered the shop and bought a cake and then asked Ms Yeap to accept the cake back while telling Ms Yeap that someone was interested in meeting her;

(iii) on 11 July 2015, Tay gave a love letter to Ms Yeap and asked Ms Yeap to call a certain phone number;

(iv) on 12 July 2015 Tay gave a card together with some 'Famous Amos' chocolates to Ms Tay;

(v) on 13 July 2015, out of curiosity Ms Yeap called the phone number that Tay gave and the recipient of the call, one Ah Kee, informed that he had never asked Tay to do what he did and that he did not know Tay and Ms Yeap;

(vi) on 15 July 2015, Ms Yeap's employee at the shop one Ms Nur Fazlin (SP5) saw Tay coming towards the shop and asked Ms Yeap to hide in the storeroom at the back because she was worried that Tay would disturb Ms Yeap;

(vii) Ms Yeap then ran into the storeroom, but Tay nevertheless followed her by entering the store through the kitchen door;

(viii) when Tay opened the storeroom door, Ms Yeap was shocked and tried to run out of the storeroom;

(ix) Tay held both Ms Yeap's hands and she tried to get her right hand released. Then, Tay's right hand grabbed Ms Yeap's buttocks and at this point Ms Yeap yelled at Tay to let go. Tay refused to let go and merely smiled. While Ms Yeap tried to release his hand, Tay hugged her from behind and with his right hand caressed Ms Yeap's breast. She felt scared and screamed but was ignored by Tay. SP5 heard Ms Yeap's screaming and rushed into the kitchen. In the kitchen, SP5 saw Ms Yeap and Tay, and Ms Yeap was in a state of fear. SP5 saw Tay holding Ms Yeap's hand and when he saw SP5 Tay let go of Ms Yeap's. Tay then went out of the shop smiling;

(x) after that SP5 asked Ms Yeap about what had happened, but Ms Yeap was at first silent and only after a while did she tell SP5 that Tay had grabbed her buttocks and breast;

(xi) Ms Yeap made a police report on 16 July 2015 (P4) in the presence of SP5. In that report, Ms Yeap did not mention that Tay had held her buttocks and breast as she felt ashamed, confused and traumatised to talk about the incident in detail and only mentioned Tay's general disturbances. Ms Yeap had also mistakenly stated in P4 that the incident happened on 13 July 2015, when it actually happened on 15 July 2015. When Ms Yeap remembered the actual date of the incident 15 July 2015, Ms Yeap went back to the police station on 16 July 2015 and made a second police report (P5) to correct that mistake and make a more detailed report of the incident. Ms Yeap also informed that her father ran into Tay and asked him not to bother Ms Yeap but Tay instead asked for money if he was to no longer bother Ms Yeap;

(xii) SP5 confirmed that Tay once bought a cake from the shop and returned it to Ms Yeap, and on another occasion he came to the shop and gave chocolates to Ms Yeap. SP5 also said that after the incident on 15 July 2015, Tay came to the shop and threatened to set fire to the shop; and

(xiii) the investigating officer (SP6) found from her investigation that though there was a CCTV recorder inside the shop, it was not in working order on the day of the incident. SP6's investigation also found that Tay had met Ms Yeap's father to settle the matter and offered to pay compensation but Ms Yeap's father did not agree. When SP6 met Ms Yeap on 2 September 2015, she was still affected by the incident.

Findings Of The Sessions Court At Close Of Prosecution Case

[8] Section 354 of the Penal Code reads:

> **Assault or use of criminal force to a person with intent to outrage modesty**
>
> Whoever assaults or uses criminal force to any person, intending to outrage or knowing it to be likely that he will thereby outrage the modesty of that person, shall be punished with imprisonment for a term which may extend to ten years or with fine or with whipping or with any two of such punishments.

[9] The learned Sessions Judge held that in order to establish a *prima facie* case for a charge under s. 354 of the Penal Code, the prosecution would have to establish the following elements of the offence:

(i) there must have been assault or use of criminal force on a person; A

(ii) such assault or use of criminal force must have been made:

(a) with intention to outrage modesty; or

(b) with knowledge that the person's modesty was likely to be outraged. B

[10] Therefore, in this case, it must be proven that:

(i) Tay assaulted or used criminal force on Ms Yeap, the victim; and

(ii) that he intended thereby to outrage the victim's modesty; or

(iii) that he knew it to be likely that he would thereby outrage victim's modesty. C

[11] In respect of the first element, *ie*, that Tay assaulted Ms Yeap or used criminal force on her, the learned Sessions Judge found that from the evidence of Ms Yeap, and her employee Ms Nur Fazlin (SP5), there was sufficient credible evidence showing that Tay held Ms Yeap's hand, hugged and held her buttocks and breast. Further, SP5 testified that she saw Tay enter the kitchen and then heard the complainant shouting from the kitchen. SP5 then entered the kitchen and she saw Tay holding Ms Yeap's hand and she could see palpable fear in Ms Yeap's face. She then saw Tay let go of Ms Yeap's hand and rush out of the kitchen. Thus, the learned Sessions Court Judge found that Tay's actions of holding the complainant's hand, hugging the complainant, holding the complainant's breast and buttocks against Ms Yeap's will fulfilled the first element of the charge. D E

[12] As for the second element, *ie*, that such assault or use of criminal force must have been made with intention to outrage modesty; or with knowledge that the person's modesty was likely to be outraged, the learned trial judge found that Tay had indeed used criminal force on Ms Yeap with the intention to violate the honour of the victim or knowing that such an act will violate the victim's self-respect, or at the very least Tay ought to have known that his action would result in Ms Yeap's dignity being outraged. The learned trial judge referred to the definition of force in s. 349, criminal force in s. 350 and assault in s. 351 of the Penal Code. F G

[13] Based on the established facts, the learned Sessions Judge found that Tay's conduct in holding the complainant's hand, hugging and holding her breast as well as her buttocks had clearly violated the victim's dignity. The evidence also clearly showed that Ms Yeap was uncomfortable with the conduct of Tay and she was in fear of him. Clearly, what Tay did was against her will. H

[14] As to the element of intention, the learned Sessions Judge correctly observed that it is a matter that can be elicited through evidence according to the facts and circumstances of the incident itself. The learned trial judge was of the opinion that Tay's act of going to Ms Yeap's shop at KB Mall and I

entering the store room of the shop and stopping the complainant from dashing out by holding her hand and buttocks, refusing to let go of the complainant when she shouted, and then hugging and holding her breast was sufficient to give rise to a reasonable inference that Tay indeed had the intention of violating the victim's dignity.

[15] The learned Sessions Judge further considered the demeanour of Ms Yeap during examination, cross-examination and also re-examination, and found it to be consistent. Thus, the trial judge accepted Ms Yeap's evidence as credible. Further, there were no elements of lying by the complainant or any of the other material prosecution witnesses, and in particular SP5. The learned Sessions Judge concluded that there was no reason for Ms Yeap to fabricate this humiliating story that lowers her own dignity.

[16] The learned Sessions Judge also dealt with the issue of corroboration and found that Ms Yeap's testimony was corroborated by that of SP5. In fact, Ms Yeap had informed SP5 that Tay hugged and held her against her wish. Further, the investigating officer (SP6) testified that at the meeting with Ms Yeap on 2 September 2015, she was still very sad and affected by the incident. Hence, the learned trial judge concluded that Ms Yeap was still traumatized even though the incident happened more than a month ago. Therefore, the learned trial judge concluded that Ms Yeap's uncheerful mood and behaviour even after more than a month showed that SP1's evidence has been supported by SP1's post-incident conduct and behavior as well as the surrounding circumstances.

[17] On the issue of the absence of a medical report, the learned Sessions Judge held that the absence of any medical report on Ms Tay was not fatal to the prosecution's case, especially when there was ample corroboration of Ms Yeap's testimony. The corroboration between SP1, SP5 and SP6 is consistent and supports each other.

[18] The defence argued that adverse inference under s. 114(g) of the Evidence Act 1950 ought to be invoked against the prosecution for the non-production of the CCTV recording. The defence contended that if the CCTV footage was tendered in evidence, it would have assisted the defence. However, the fact of the matter was that there was no CCTV recording that was obtained by the investigating officer (SP6). SP6 testified that the investigations revealed that the CCTV recorder was not in working order at the time of the incident and as such there was no CCTV recording. Ms Yeap and her father had informed SP6 that the CCTV recorder had not been working for several days and that Ms Tay had asked the contractor to repair it but it had not been repaired when the incident took place. Hence, in the absence of the recording, it cannot be said that there was suppression of evidence by the prosecution and no adverse inference under s. 114(g) of the Evidence Act can be invoked.

[19] The learned trial judge further considered the issue of contradictions or discrepancies in the prosecution's case raised by the defence. There were two dates of the incident given by the complainant (SP1) namely 13 July 2015 in the first police report (P4) and 15 July 2015 through the complainant's oral testimony in this court. The learned Sessions Judge was of the view that the discrepancies in the date of the event are not material. The learned trial judge accepted the complainant's explanation for this discrepancy. The complainant explained that she tried hard to forget the incident and did not want to remember it anymore. The complainant also said the first police report (P4) was made out of fear and shame, and since she was accompanied by Nur Fazlin (SP5) when the first report was made, she was very embarrassed to narrate the incident in detail. Therefore, the complainant only narrated Tay's harassment of the complainant in the first police report (P4), without mentioning him hugging and holding her breast. Later, the complainant made a second report with more details of the incident. The learned Sessions Judge found that the complainant was still affected by the trauma of the incident, and considering this fact, the difference in evidence between the first police report and the complainant's evidence in court was immaterial and did not undermine the prosecution's case, nor did it make the main witness, SP1, an unreliable witness.

[20] Based on all of the above, the learned Sessions Judge found that the prosecution had succeeded in proving a *prima facie* case.

The Defence Case

[21] Tay testified under oath and denied that he had outraged Ms Yeap's modesty. He stated that Ms Yeap and Nur Fazlin had conspired to falsely accuse him of having grabbed Ms Yeap's hand, breast and buttock. He admitted going to Ms Yeap's shop on 15 July 2015 at about 9.30pm but his version of events was as follows:

(i) he went to Ms Yeap's shop with some cookies and a greeting card with a message from Ah Kee. As soon as he arrived at the shop, he spoke to Nur Fazlin (SP5) and asked for Ms Yeap. After having ascertained that Ms Yeap was in the kitchen, he asked Nur Fazlin permission and went to the back where he found the complainant in the shop kitchen. Tay then handed the cookies and greeting card to Ms Yeap with both hands and Ms Tay had received them with both her hands calmly and with a smile. According to Tay, when he reached out his hands had touched Ms Yeap's palm. Tay stated that Ms Yeap's allegations of shouting, deliberately holding her hand, squeezing her chest, squeezing her buttocks are false, purely fabricated by the complainant;

(ii) after that, he said he walked out normally from the kitchen. Nur Fazlin entered and saw him hand over the items to the complainant. He said that the claim by SP5 that she heard the complainant scream and saw him leaving in a hurry is false, and a mere fabrication;

(iii) he further denied ever threatening to burn down the complainant's shop;

(iv) he said the CCTV in the shop was working when he was in the shop on 15 July 2015; and

(v) as for the incident on 11 August 2015, he stated that he had run into the complainant's father and had asked for compensation for having been punched by the complainant's father.

[22] Tay also called SD2, Insp. Zamzuri, to corroborate his version that that the complainant's father had punched him. He further stated that the allegation that he molested the complainant are false and defamatory and that Nur Fazlin had conspired with the complainant to falsely implicate him.

Findings At End Of Defence Case

[23] After examining all the available evidence, the learned trial judge found that the defence was merely an empty denial that is not supported by any other witnesses or facts. The Sessions Court found the defence version to be incredible as it was raised for the first time during the defence case. This version of the defence was never put or suggested to the prosecution's witnesses during the prosecution's case and was merely an afterthought.

[24] Hence, in the overall, the learned Sessions Judge concluded that Tay had failed to cast any reasonable doubt on the prosecution's case. Therefore, he was convicted as charged.

Sentence

[25] The following mitigating factors were submitted by learned counsel for Tay:

(i) Tay, aged 48, used to practice as an advocate and solicitor from 1994 till 2014, and was at the material time working as a legal advisor. He was married with two children, and the sole breadwinner of the family. When in legal practice, he was once the Chairman of the Kelantan State Bar Disciplinary Panel. He was also in one of the sub-committees of the Kelantan Golf and Country Club. He was also involved in several NGOs and charitable bodies. The defence asked for a sentence of fine only;

(ii) the prosecution sought a custodial deterrent sentence based on the following aggravating factors:

(a) it is a serious offence;

(b) need to take into account the public interest and not only the interest of the accused;

(c) the victim is traumatised;

(d) Tay had defamed the victim;

(e) such incidents are becoming more prevalent;

(f) after the incident, Tay was still harassing the victim; and

(g) Tay as a lawyer should know that outraging modesty is a serious offence.

[26] Based on the facts and circumstances of the case, the learned trial judge was of the view that punishment in the form of a fine was not appropriate. The learned Sessions Judge was of the view that a custodial sentence was warranted as deterrence to other potential offenders. Having considered the mitigating and aggravating factors, the Sessions Judge sentenced Tay to three years imprisonment from the date of sentencing, *ie*, 22 February 2017.

At The High Court

[27] Tay filed an appeal to the High Court against the conviction and sentence, whilst the Public Prosecutor filed a cross-appeal against the sentence.

[28] The learned High Court Judge agreed with the Sessions Court's findings that the complainant was a credible witness. The complainant gave reliable evidence as to what had happened before and after the incident on 15 July 2015. The complainant was convincing in her testimony that Tay was the one who molested her. The learned High Court Judge concurred with the Sessions Court's finding on the complainant's credibility as seen through her demeanour, as well as the quality of her evidence which was strong, probable, rational and consistent.

[29] The High Court found that the elements of the charge under s. 254 of the Penal Code had been successfully proven by the complainant's evidence alone. However, as a matter of prudence, the learned High Court Judge agreed with the Sessions Court that there was strong corroborative evidence in the form of testimony from SP5. The High Court found that SP5's testimony was consistent with the complainant's testimony and supported each other. SP5's testimony also never wavered during cross-examination. In this regard, the High Court agreed with the Sessions Court that SP5 was a credible witness because there was no reason for her to fabricate a story and there was no reason for the court not to believe her.

[30] The next supporting evidence are the police reports P4 and P5 lodged by the complainant. The High Court found the complainant's testimony to be consistent with her police reports. As for the discrepancy in the date mentioned in P4, the learned High Court Judge referred to the case of *PP v. Datuk Hj Harun Hj Idris & Ors* [1977] CLJU 92; [1977] 1 LNS 92; [1977] 1 MLJ 180 where the Federal Court ruled that "any contradictions and inconsistencies in the police report can be corrected by this witness during his examination-in-chief ..." This was done Ms Yeap during her testimony.

[31] The High Court also found that the complainant's actions in making the police reports P4 and P5 were relevant under s. 8 of the Evidence Act 1950 because it showed the complainant's conduct after the incident. And this goes towards establishing the fact that the incident did take place and further showed the complainant's state of mind.

[32] Tay's conduct in coming several times to the shop prior to the incident to make observation and preparation was also relevant and Tay had taken advantage of the complainant who was hiding in a small storeroom and took the opportunity to hug and grab Ms Yeap's breast and buttock. The conduct of the complainant's father who had punched Tay is also relevant because the complainant's father would not have done so if the incident had not happened. SP6 also confirmed that Tay met with the complainant's father to resolve this matter between them but the complainant's father did not agree.

[33] Overall, the High Court agreed with the Sessions Court's findings that the prosecution had succeeded in proving a *prima facie* case. And that the defence case was merely an empty denial and not supported by supporting evidence. The High Court found that Tay's testimony was contradictory to the complainant's testimony. And unlike Tay's testimony, the complainant's evidence was corroborated by an abundance of supporting evidence.

The Issue Of The Date Of The Offence In The Charge

[34] The defence contended that the Sessions Court had wrongly convicted Tay on a charge which states the date of offence as 13 July 2015, whilst the evidence led by the prosecution was that the offence was committed on 15 July 2015. The learned High Court judge found from the notes of proceedings that in the course of the trial, the learned Deputy Public Prosecutor had applied to amend the date of the offence stated in the charge from 13 July 2015 to 15 July 2015. The amended charge was then read and explained to Tay, and he pleaded not guilty. And after that, the learned Sessions Judge continued the trial by calling SP5. This was indicative of the fact that the Sessions Court had allowed the amendment to the charge. Hence, the learned High Court Judge found this issue to be a non-starter.

The Issue Of Incomplete Sessions Court CRT Recording

[35] Tay's solicitors had requested to be provided with the CRT recording of proceedings in the Sessions Court. However, due to technical problems, only the CRT recording of the defence case was available. The Registrar of the Sessions Court had called the IT contractor to retrieve the full CRT recording but also to no avail.

[36] Learned counsel for Tay submitted that the unavailability of the full CRT recording means that the High Court would not be able to see for itself the demeanour of the prosecution witnesses as well as the alleged interference of the learned Sessions Judge when Tay's counsel was cross-examining the prosecution witnesses.

[37] The High Court found that the issue of the absence of the full CRT recording had no merit. The CRT recording system was introduced in the courts in phases from 1 May 2009 onwards, but it did not replace the use of conventional evidence recording as stipulated in ss. 266 and 267 of the Criminal Procedure Code. And in this case, the learned Sessions Judge had taken comprehensive long hand notes of proceedings in accordance to ss. 266 and 267 of the Criminal Procedure Code. Further, the case for the prosecution did not hinge solely on the demeanour of witnesses but on the strength of the overall evidence. Therefore, the High Court concluded that the absence of the complete CRT recording does not render a conviction invalid or void.

Issue – Absence Of CCTV Recording

[38] Just as in the Sessions Court, learned counsel raised the issue of the non-existent CCTV recording at the shop where the incident took place. The High Court rejected this argument as it was devoid of any merit.

Issue – Allegation That Sessions Judge Interfered In The Cross-Examination Of The Complainant

[39] After examining the notes of proceedings, the learned High Court Judge rejected this argument because the Sessions Court Judge had only disallowed questions on issues where uncontroverted evidence was already there. This did not cause any unfairness to the accused.

High Court's Conclusion

[40] Hence, the High Court found that the conviction by the Sessions Court was safe and accordingly dismissed the appeal against conviction.

Appeal Against Sentence

[41] The High Court allowed Tay's appeal against sentence based on the following:

(i) Tay was a first offender;

(ii) he was under stress because his wife was suffering from cancer;

(iii) imprisonment of three years imposed by the Sessions Court will bring a crushing effect to Tay. Tay who has been remanded for seven days had repented before being released on bail;

(iv) Tay was the family bread winner who had three dependents, namely two small children and a wife who was a housewife;

(v) the long prison sentence imposed by the Sessions Court will have an economic impact on the family and will separate Tay from his children.

(vi) his wife also needs to get intensive treatment and Tay was the primary caregiver; and

(vii) the wife's cancer had advanced, necessitating frequent visits to the hospital and he needs to take his wife to the hospital more often. If Tay is in prison for a long time, no one will take his wife to the hospital.

[42] The High Court was of the view that the Sessions Court had failed to give due consideration to these facts, thus justifying appellate intervention to reduce the sentence.

The Appeal Before This Court

[43] The issues raised before this court were similar to those raised at the High Court. At the outset, it is worth noting that both the Sessions Court and High Court made concurrent findings of fact, and it is well established principle that in such circumstance an appellate court should be slow to disturb these findings unless it is shown that the evidence does not support such findings. This was made clear by the Federal Court in *PP v. Munusamy* [1979] 2 MLJ 286; [1980] 1 LNS 63 in the following words:

> Where there have been concurrent findings of fact in the lower courts it should not be made the practice in the appeal court to review these concurrent findings of fact unless it is shown that there was no evidence to support the inferences drawn in the lower courts.

[44] This principle was reiterated by the Federal Court in *Puganeswaran Ganesan & Ors v. PP & Other Appeals* [2020] 9 CLJ 326; [2020] 12 MLJ 165, where the court noted that where crucially the concurrent findings involve the question of the credibility of the witnesses, the appellate court should not interfere unless it is convinced that such findings were patently wrong. In this regard, the Federal Court had referred to the Privy Council's decision in *Antonio Dias Caldeira v. Frederick Augustus Gray* [1934] CLJU 5; [1934] 1 LNS 5; [1936] 1 MLJ 110 and held as follows:

> ... the functions of an appellate court, when dealing with a question of fact, and a question of fact in which questions of credibility are involved, are limited in their character and scope, and that in an appeal from the decision of a trial judge based on his opinion of the trustworthiness of witnesses whom he has seen, an appellate court must in order to reverse, not merely entertain doubts whether the decision below is right but be convinced that it is wrong. See also *Chow Yee Wah & Anor v. Choo Ah Pat* [1978] 2 MLJ 41b (PC); *Samar binte Mansor v. Mustafa Kamarul Arifin* [1974] 2 MLJ 71.

[45] Further, in *Samar Mansor v. Mustafa Kamarul Arifin* [1974] CLJU 147; [1974] 1 LNS 147; [1974] 2 MLJ 71, Raja Azlan Shah FCJ (as HRH then was) in answering the question whether an appellate court should substitute its own views of the facts for that of the trial judge had this to say:

> For an appellant to succeed in an appeal against a finding of fact made by a single judge, he must convince the appellate court that the learned judge was wrong in his conclusion. That the appeal is by way of rehearing does not alter the situation. A rehearing is not however a retrial of the issues. The question is not whether an appellate court can substitute its views of the facts which of course it is empowered to do so, but whether it should do so. However such an appellate court may be in an equal position with the trial judge as to the drawing of inferences, it ought not to reverse the finding of fact unless it is convinced that it is wrong. It is not whether the inferences are right but whether an appellate court is convinced that they are wrong. If that finding is a view reasonably open on the evidence, it is not enough to warrant its reversal just because an appellate court would have come to a different view. Merely differing views do not establish that either view is wrong, but in balancing these two views an appellate court should give due weight to the nature of the facts as found by the trial judge.

[46] Now, the counsel for Tay had submitted at length that the concurrent findings of the trial judge and the High Court judge that the prosecution had established a *prima facie* case were wrong. The concurrent findings on the credibility of Ms Yeap and SP5 were also challenged. It was submitted that both these witnesses were not credible. However, we have noted that it has not been shown that the concurrent findings of fact by the courts below are unsupported by the evidence, direct or circumstantial. Of crucial importance to note in this regard is that the concurrent findings involve the question of the credibility of the witnesses, namely SP1 and SP5, and we do not find any cogent reason to disagree with the trial judge's finding on the credibility of these two important witnesses. Their evidence was largely consistent and supported each other.

[47] The issue of the date in the charge was raised once again before this court. We did not find any merit in this issue. The charge originally stated that the offence was committed on 13 July 2015 and this was subsequently amended to 15 July 2015 and the amended charge was then read and explained to Tay, and he pleaded not guilty, following which the trial continued. Ms Yeap explained why she had stated the wrong date in her first police report and that explanation was accepted by the Sessions Court. The High Court judge also found the explanation to be plausible and reasonable. In any event, Tay is not prejudiced by this change in date, he did not deny being in Ms Yeap's shop on 15 July 2015. He also did not deny going into the kitchen side of the shop and into the store where Ms Yeap was hiding. His defence was that though he was there, he did not indecently assault Ms Yeap by caressing her breast and touching her buttocks, nor that he used criminal force on her.

[48] Learned counsel for Tay also raised the issue of the non-production of the CCTV recording. We did not find any error in the decision of the High Court in rejecting this argument. The evidence of the investigating officer

(SP6) was that the CCTV recorder was not functioning and as such there was no CCTV recording available to be produced in court. In any event, the production of the CCTV recording of the goings on in the shop front, even if it was available, was not going to help Tay as the offence was said to have been committed in the store at the kitchen, and not in front of any CCTV camera.

[49] Now, as for the incomplete CRT recording, learned counsel for Tay submitted at length. This issue was also considered in depth by the learned High Court judge. The High Court judge was satisfied that there was a genuine technical fault resulting in the system not capturing and storing the audio-video data of the proceedings during the prosecution stage. Nevertheless, the High Court found the manual notes of proceedings recorded in long hand by the learned Sessions Court judge to be sufficient and in conformity with the requirements of the Criminal Procedure Code. In the circumstance, we do not find any miscarriage of justice. We agree with the reasons given by the learned High Court judge that the failure of the CRT system to record the entire trial proceeding did not render the trial a nullity in order for a retrial to be ordered.

[50] We are in the overall satisfied that the High Court was right in affirming the decision of the Sessions Court to find the appellant, Tay, guilty of the offence charged. There was sufficient judicial appreciation of the evidence by the learned trial judge and she had not misdirected herself either on the facts or on the law. Hence, we found that the conviction was safe and accordingly dismissed the appeal against conviction as in Appeal No. 504.

[51] As for the cross-appeal on sentence by the Public Prosecutor, we were of the considered view that the sentence imposed by the High Court was manifestly low. Considering the seriousness of the offence and the impact on the victim, Ms Yeap, and further taking into consideration the sentencing trend for an offence under s. 354 of the Penal Code, a sentence of three months' imprisonment was manifestly inadequate. The learned Deputy Public Prosecutor argued for the sentence of three years imprisonment imposed by the Sessions Court be reinstated. However, we did not agree with that argument and were of the view that a more appropriate sentence would be imprisonment for a year whilst maintaining the fine of RM8,000 with eight months imprisonment in default of payment. Hence, we allowed the Public Prosecutor's cross-appeal and set aside the sentence of imprisonment of three months imposed by the High Court and substituted it with imprisonment of one year and affirmed the fine of RM8,000 in default eight months' imprisonment.

Orders accordingly.